Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

OCTOBER TERM, 1993

ROGER LEE MILLER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner subjected to a pretextual arrest?
2. Was the Fourth Amendment to the United States Constitution violated when a police officer performed a warrantless search of Petitioner's vehicle?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROGER LEE MILLER,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

Petition for a Writ of Certiorari
to the Arkansas Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Roger Lee Miller, respectfully prays that a writ of certiorari issue to review the jdugment and opinion of the Arkansas Court of Appeals regarding the Fourth Amendment issue raised therein.

OPINION BELOW

The opinion of the Arkansas Court of Appeals is published and appears at Appendix ("Appdx.") 1.

JURISDICTION

The Arkansas Court of Appeals filed its opinion on December 15, 1993 (Appdx. 1). This petition is filed within ninety (90) days of that opinion. Jurisdiction of this Court is predicated on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .."

STATEMENT OF THE CASE

On December 18, 1991, two narcotics officers, David Drennan and Roger Ahlf, were conducting surveillance of a drug transaction involving a confidential informant. During this surveillance, Ahlf observed the Petitioner sitting in his van at the Shell Superstop. Ahlf had previously been advised by the confidential informant that the Petitioner was a drug dealer and was driving on a suspended driver's license. Ahlf recognized the Petitioner from a previous drug investigation.

After the confidential informant was taken elsewhere, Ahlf and Drennan returned to the Shell SuperStop and tried to locate the Petitioner. The investigators later saw the Petitioner's automobile at another suspected drug dealer's house. Drennan

and Ahlf set up surveillance there and attempted to follow Petitioner when he left. Ahlf and Drennan followed Petitioner to a Wendy's Restaurant where he was stopped by them.

After Petitioner's arrest, Ahlf frisked him and discovered an address book in Petitioner's interior coat pocket. Ahlf looked through the address book and found a small amount of marijuana residue. Ahlf did not find any weapons on Petitioner and after the marijuana residue was found in the address book, Ahlf stopped searching for weapons. At that time, Ahlf placed Petitioner in Drennan's custody.

While Drennan took Petitioner to another officer, Ahlf conducted an inventory search of Petitioner's automobile. When Drennan returned to

Petitioner's automobile, he found cocaine in a concealed location between the seat cushions. Both Drennan and Ahlf denied that Drennan was assisting in the inventory search.

On December 19, 1991 the Petitioner was charged with possession of cocaine with intent to deliver. On January 11, 1992 Petitioner filed a motion to suppress the cocaine because the arrest and search of the Petitioner and his vehicle was in direct violation of his right of privacy guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. On May 6, 1992 a hearing on Petitioner's motion to suppress the evidence was held with the Honorable Robert Roberts. On May 14, 1992 the court reviewed testimony from the hearing as well as the cases presented by Petitioner.

After a review of the above, the court denied Petitioner's motion to suppress the evidence. Based upon the court's denial of Petitioner's motion to suppress, Petitioner entered a conditional plea of guilty preserving his right to appeal pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. Thereafter, on June 12, 1992 Petitioner filed his notice of appeal to the Arkansas Court of Appeals.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE PETITIONER WAS SUBJECTED TO A PRETEXTUAL ARREST.

The Arkansas Court of Appeals incorrectly affirmed the Lower Court's decision to deny Petitioner's motion to suppress because the cocaine and marijuana were found pursuant to an unconstitutional pretextual arrest and an unconstitutional

search. An examination of the circumstances surrounding Petitioner's arrest reveals that the arrest was pretextual. Investigators Ahlf and Drennan were conducting surveillance of drug transactions involving a confidential informant from a parking lot of a Shell Superstop. During that time, Ahlf saw Petitioner's van parked at the pay phone on the same parking lot. Ahlf testified that when his confidential informant left a house where he had purchased cocaine, Petitioner drove from the Shell Superstop to that residence. Ahlf further testified that his confidential informant had previously identified Petitioner as a cocaine dealer. Ahlf was further advised by his confidential informant that Petitioner was driving a black van and driving on a suspended driver's license.

Ahlf stated that he had verified the suspension of Petitioner's driver's license earlier that afternoon.

After dropping off the confidential informant at another location, Ahlf and Drennan returned to the Shell SuperStop to attempt to locate Petitioner. Upon return to the Shell Superstop, the investigators saw the Petitioner driving his van down a street, tried to follow him, but lost him in traffic. The van was later found by the investigators at another residence that was believed to be a drug dealer's. The investigators set up surveillance and after Petitioner left the residence, investigators caught up to him at a Wendy's Restaurant whereupon they activated their blue lights and requested the Petitioner to pull over.

After Petitioner was stopped, the investigators removed Petitioner from his van and he was immediately searched by Ahlf. As Ahlf searched the Petitioner's inside coat pockets, he found an address book. Although Ahlf found a small amount of marijuana in the address book, Petitioner was never charged with possession of marijuana. Ahlf did not find any weapons on Petitioner. Petitioner was handcuffed and placed in Drennan's custody while Ahlf conducted an "inventory search incidental to arrest". When asked what he was looking for, Ahlf stated "additional marijuana". Ahlf admitted that when he stopped and arrested Petitioner on a suspended driver's license, he hoped that he would find some drugs.

In Richardson v. State, 288 Ark. 407, 706 S.W.2d 363 (1986), the Arkansas Supreme Court reversed the defendant's conviction because his arrest was pretextual. The Court stated that "Pretext must be a matter of the arresting officer's intent, and that must be determined by the circumstances of the arrest." The Fourth Circuit Court of Appeals in Henderson v. United States, 12 F.2d 528 (4th Cir. 1926) held that:

> When it appears, as it does here, that the search and not the arrest was the real object of the officers entering upon the premises, and that the arrest was a pretext for or at the most an incident of the arrest, the search was not reasonable within the meaning of the Constitution.

In Richardson, the Court also quoted Brown v. State, 442 N.E.2d 1109 (Ind. 1982), in which the Supreme Court of Indiana stated that:

> The issue of pretextual arrests only arises when the surrounding circumstances show that the arrest is only a sham being used as an excuse for making a search for evidence for a different and more serious offense for which no probable cause exist.

See also, United States v. Lefkowitz, 285 U.S. 452 (1932); United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988); and, United States v. Smith, 799 F.2d 704 (11th Cir. 1986).

Based upon the investigator's own testimony and the surrounding circumstances, the only reasonable conclusion that can be reached is that the Petitioner's arrest was pretextual. The circumstances surrounding his arrest show that the detention and arrest of the Petitioner was used as an excuse for making a search of him and his vehicle for evidence of a different and more serious offense for which no probable cause

existed. While Petitioner concedes an objective analysis of the facts and circumstances of a pretextual stop is appropriate, one must conclude from the facts and circumstances surrounding Petitioner's arrest was that it was a pretextual one. See, United States v. Rivera, 906 F.2d 319 (7th Cir. 1990).

II. THE PETITIONER'S FOURTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN A POLICE OFFICER PERFORMED A WARRANTLESS SEARCH OF HIS VEHICLE.

The United States Supreme Court has stated that all warrantless searches are, per se, violative of the Fourth Amendment to the United States Constitution unless they fall within a carefully tailored exception. Mincey v. Arizona, 437 U.S. 385 (1987). This language from Mincey was quoted in United States v. Ross, 456 U.S. 798 (1982), and United States v. Perry,

925 F.2d 1077 (8th Cir. 1991). In Leopold v. State, 15 Ark. App. 292, 692 S.W.2d 780 (1985), the Arkansas Court of Appeals stated that "any warrantless search of a vehicle is presumptively unconstitutional."

However, in Florida v. Wells, 110 S. Ct. 1632, 96 S. Ct. 3092 (1976), the Supreme Court held that the Fourth Amendment's prohibition of unreasonable searches and seizures is not violated by local police warrantless routine inventory searches, following standard procedures, of an accused automobile impounded for violations where: (1) Police standard procedures were not a pretext for concealing investigatory police motives; and (2) Where the inventory was not unreasonable in scope. See, Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738

(1987). In Bertine, the Supreme Court held that a bona fide inventory search of an automobile in preparation for a reasonable impoundment, where is it clearly the purpose of safeguarding property for the protection of the owner, police, and tow company, and not for the purpose of gathering evidence without a warrant, is reasonable and does not violate the Fourth Amendment.

Although Ahlf testified about standard state police procedure for conducting an inventory search, he admitted he had not followed that procedure. He had not prepared a complete inventory which was consistent with the search and admitted he stopped conducting the inventory when the cocaine was found by Drennan. Drennan testified that he found the cocaine between the seat

cushions in Petitioner's van. Drennan admitted he had not seen the drugs in plain view nor had he seen any contraband in plain view when he entered the van. It was only after he had removed the plastic out of the seat that he determined that the seat contained contraband.

The Court's ruling that Drennan's discovery of the cocaine was a lawful inventory search was clearly against the preponderance of the evidence. Both Drennan and Ahlf denied that Drennan was assisting Ahlf in conducting the inventory search of Petitioner's van. Drennan simply entered Petitioner's van to search it for contraband whereupon he found it in a concealed location. Drennan never stated why the warrantless search of the van was conducted. Because Drennan, who discovered the cocaine, did not attempt to

articulate his reason for the search, the State failed to carry its burden of proving that the warrantless search of the van was reasonable. Since the Trial Court's ruling was in error, any evidence found as a result of the unlawful search should be suppressed. See, Wong Sun v. United States, 371 U.S. 471 (1965).

CONCLUSION

The objective evidence clearly shows that narcotic investigators Ahlf and Drennan were actively conducting narcotic investigations and trafficking when they arrested Petitioner. While Ahlf stated that he pulled Petitioner over because he was driving on a suspended driver's license, circumstances surrounding Petitioner's arrest indicate that it was a pretext for the subsequent search of

Petitioner's van in efforts to find contraband.

The Court's ruling that the controlled substances that were discovered during the course of the inventory search was lawful was clearly against the preponderance of the evidence. Because the State failed to carry its burden of proving by a preponderance of the evidence that the search and seizure in this case fell within in a recognized exception to the warrant requirement, the Trial Court ruling was in error.

Therefore, the Court's ruling should be reversed, this Petition for Writ of Certiorari granted, and the case remanded for directions that the unlawfully obtained evidence be suppressed, allowing Petitioner to withdraw his conditional plea of guilty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anthony J. Sherman, do hereby certify that a copy of the foregoing has been duly served upon: Winston Bryant, Arkansas Attorney General, 200 Tower Building, 323 Center Street, Little Rock, Arkansas; by U.S. mail, postage prepaid, this 5th day of April, 1994.

Anthony J. Sherman

DIVISION II

ARKANSAS COURT OF APPEALS

No. CACR 92-1028

Opinion Delivered December 15, 1993

ROGER LEE MILLER APPELLANT

VS.

STATE OF ARKANSAS APPELLEE

APPEAL FROM THE WHITE COUNTY CIRCUIT COURT

HONORABLE ROBERT EDWARDS, CIRCUIT JUDGE

AFFIRMED

JOHN E. JENNINGS, Chief Judge

Roger Miller was charged with possession of a controlled substance (cocaine) with intent to deliver and driving on a suspended driver's license. After a pretrial motion to suppress evidence was denied, Miller entered a conditional plea of guilty under Ark. R. Crim. P. 24.3(b). He was sentenced to twenty-five years imprisonment with ten

years suspended of the drug charge, and was fined $500.00 for driving on a suspended license.

The primary argument on appeal is that the trial court erred in not finding that Miller's arrest was pretextual and therefore erred in not suppressing the evidence obtained as the result of the arrest. We find no error and affirm.

The facts are not in dispute. Most of the testimony at the suppression hearing was provided by Roger Ahlf, an Arkansas state police officer, who worked as a narcotics investigator. In December of 1991, Ahlf was working with David Drennan, a narcotics investigator for the Searcy Regional Drug Task Force. During that time Ahlf and Drennan were told by a confidential informant that the appellant was a cocaine dealer. Ahlf was also told

by the confidential informant that appellant was driving a black van on a suspended driver's license, and Ahlf verified this information.

On December 18, 1991, Officer Ahlf stopped the appellant for driving on a suspended driver's license. Ahlf testified that he normally did not work traffic, that he wrote only two or three tickets per years, and that he stopped the appellant in hopes that he would find drugs. He testified that he frisked the appellant for weapons, that he knew appellant to be a drug user, and that he knew that people who use cocaine carry razor blades. In the course of the search of appellant's person, Ahlf found an address book containing marijuana residue, described as "probably less than 1- 1/2 of a gram." Miller was taken into custody

and the officer's search of the van turned up a plastic bag containing cocaine.

The circuit court in denying the motion to suppress said, "While Investigator Ahlf may have had motives in addition to a traffic stop, the evidence does not establish that the arrest would not have been made but for the drug and search interest of Investigator Ahlf."

Appellant relies primarily on Richardson v. State, 228 Ark. 407, 706 S.W.2d 363 (1986). There, the supreme court quoted from McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950):

> The Supreme Court has specifically held that "an arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 285 U.S. 452 (1932) .... It is settled law that "when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest

> was a pretext for or at the most an incident of the search," the search was not reasonable within the meaning of the Constitution. Henderson v. United States, 12 F.2d 528 (4th Cir. 1926).

Appellant also notes the supreme court's approval of a statement found in Brown v. State, 442 N.E.2d 1109 (Ind. (1982), that "the issue of pretext arrest only arises when the surrounding circumstances show that the arrest is only a sham being used as an excuse for making a search for evidence of a different and more serious offense for which no probable cause exists."

While it is true that the issue of pretextual arrest was the subject of extended discussion in Richardson, it would seem that the real basis for the court's holding was a violation of the detention limits imposed by Rule 3.1 of the Arkansas Rules of Criminal Procedure.

The court in Richardson said, "Regardless of whether we can technically justify the arrest on the charge of public intoxication, we can find no justification whatever for these rules violations."

Shortly after the decision in Richardson, the supreme court decided Hines v. State, 289 Ark. 50, 709 S.W.2d 65 (1986). After distinguishing Richardson, the court, in an unanimous decision, said:

> Claims of pretextual arrest raise a unique problem in the law -- deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically the more serious, crime. Where the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the cover motive been absent. Professor LaFave,

> Criminal Procedure, § 3.1(d), p. 144, describes this as the correct result. Because the action would have been taken in any event, he states, "[T]here is no conduct which ought to have been deterred and, thus, no reason to bring the Fourth Amendment exclusionary rule into play." Abel v. United States, 362 U.S. 217 (1966). See People v. Guido, 95 Misc.2d 47, 407 NYS 2130 (1978).

See also, Ray v. State, 304 Ark. 489, 803 S.W.2d 894 (1991). As the decision in Hines at least implies, the test should be an objective one. Virtually all courts that have recently considered the question agree. See, e.g., United States v. Rivera, 906 F.2d 319 (7th Cir. 1990) (an officer's subjective intent is irrelevant); United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991); United States v. Rivera, 867 F.2d 1261 (10th Cir. 1989); (an objective analysis of the facts and circumstances of a pretextual stop is

appropriate, rather than an inquiry into the officer's subjective intent); United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988); United States v. Causey, 834 F.2d 1179 (5th Cir. 1987); United States v. Gallo, 927 F.2d 815 (5th Cir. 1991); United States v. Bates, 840 F.2d 858 (11th Cir. 1988); State v. Mease, 842 S.W.2d 98 (Mo. 1992); State v. Olsen, 482 N.W.2d 212 (Minn. 1992); State v. Garcia, 461 N.W.2d 460 (Iowa 1991). These decisions and others are based, at least in part, on statements made by the United States Supreme Court. In Scott v. United States, 436 U.S. 128 (1978), the Supreme Court said that police searches are to be tested "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." In Horton v.

California, 496 U.S. 128 (1990), the Court said that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Professor LaFave puts it this way:

> Likewise, if the police stops X's car for minor offense A, and they "subjectively hoped to discover contraband during the stop" so as to establish serious offense B, the stop is nonetheless lawful if "a reasonable officer would have made the stop in the absence of the invalid purpose."

Wayne R. LaFave, Search and Seizure (Supp. 1994 at 22). We conclude that this is the test to be applied.[1] We think this test

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[1]The Eighth Circuit Court of Appeals has held that the test is whether the officer could validly have made the stop and that "so long as the police are doing no more than they are legally permitted and objectively authorized to so, [the resulting stop or] arrest is constitutional." United States v.

is consonant with the most recent decisions of the Arkansas Supreme Court in Hines and Ray, and with the statements of the United States Supreme Court in Horton v. California. It was also the test utilized by the trial court here.

In the case at bar it is quite clear that Officer Ahlf's primary purpose in stopping appellant was to search for drugs. As the supreme court said in Hines, however, the arrest is not "tainted" by this fact "so long as the arrest would have been carried out" anyway. We think that the trial court's finding that the arrest would have occurred in any event is not clearly erroneous. The test is whether a "reasonable officer" would have made the

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Cummins, 920 F.2d 498 (8th Cir. 1990) (quoting United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989)).

traffic stop -- not whether this particular officer would have made the stop absent his ulterior motive. The Constitution does not prohibit officers assigned to work on particular types of offenses to refrain from arresting those who commit offenses outside the officers' area of specialty.

If, as we have held, the stop and arrest of the appellant was valid, there remains the question of the validity of the subsequent search. Officer Ahlf characterized the search as both an "inventory" and as a search incident to arrest. Our decision on this point is clearly governed by New York v. Belton, 450 U.S. 1028 (1981). There the Court held that when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a

contemporaneous incident of that arrest, search the passenger compartment of that automobile. See also, Campbell v. State, 294 Ark. 639, 746 S.W.2d 37 (1988); Williams v. State, 4 Ark. App. 24, 627 S.W.2d 28 (1982). Because this was a valid search incident to arrest under Belton we need not reach the issue of whether a valid inventory was conducted. See Stevens v. State, 38 Ark. App. 209, 832 S.W.2d 275 (1992).

For the reasons stated the decision of the trial court is affirmed.

ROBBINS and MAYFIELD, JJ., agree.